# SUPREME COURT OF THE UNITED STATES.

## No. 200.

THE TRAVELLERS' INSURANCE COMPANY OF CHICAGO, PLAINTIFFS IN ERROR,

vs.

ISABELLA MOSLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the Circuit Court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in said district, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said Circuit Court, on Saturday, the twentieth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-first year.

WILLIAM H. BRADLEY, *Clerk.*

*Assumpsit.*

ISABELLA MOSLEY
*vs.*
TRAVELLERS' INSURANCE COMPANY OF CHICAGO, Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-six, came Isabella Mosley, plrintiff, by Hervey, Anthony & Galt, her at-
2 torneys, and filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in said district, her praecipe for a writ of summons against the Travellers' Insurance Company of Chicago, Illinois, defendant; and also, at the same time, filed her bond for costs in said entitled cause; which said praecipe and bond are respectively in the words and figures following, to wit:

The United States Circuit Court, northern district of Illinois, of the March term, 1867.

ISABELLA MOSLEY
*vs.*
TRAVELLERS' INSURANCE COMPANY OF CHICAGO, Illinois.

UNITED STATES OF AMERICA, *Northern District of Illinois* :

The clerk will please issue a summons in above cause, returnable to March term, 1867, directed to the marshal, in plea of trespass on case upon promises, damages ($10,000) ten thousand dollars.

HERVEY, ANTHONY & GALT,
*Att'ys for Plaintiffs.*

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Dec. 19th, 1866. Wm. H. Bradley, cl'k.

REC. 200—1

3 Circuit Court, March term, A. D. 1867.

*Assumpsit.*

ISABELLA MOSLEY
*vs.*
TRAVELERS' INSURANCE COMPANY OF CHICAGO.
Illinois.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her, hereby agree and stipulate that execution may issue against our property for any costs taxed against us.

Dated this 19th day of December, A. D. 1866.

HERVEY, ANTHONY & GALT.

Endorsed: Filed Dec'b'r 19th, 1866. Wm. H. Bradley, clerk.

On the same day, to wit, the 19th day of December, A. D. 1866, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

4 CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon the Travellers' Insurance Company, Chicago, Illinois, if it shall be found in your district, to be and appear before our judges of our Circuit Court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Isabella Mosley in a plea of trespass on the case upon promises, to her damage, as she alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 19th day of December, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the 91st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50 cent int. rev. stamp cancelled.]

There being no president of the within-mentioned Travelers' Insurance Co., Chicago, Illinois, I served the within writ upon said
5 company by delivering a true copy thereof to John W. Clapp, the secretary of said company, on the 15th day of February, A. D. 1967.

J. R. JONES, *U. S. Marshal,*
By A. B. COTES, *Deputy.*

Endorsed: Filed May 6th, A. D. 1867. Wm. H. Bradley, clerk.

On this day, to wit, the 1st day ot March, A. D. 1867, came said plaintiff, by her said attorneys, and filed in said clerk's office her declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

United States Circuit Court, March term, 1867.

UNITED STATES OF AMERICA, *Northern District of Illinois*:

Isabella Mosley, who is a subject of his majesty, Louis Napoleon, the Emperor of the French, and an alien plaintiff, by Hervey, Anthony & Galt, her attorneys, complains of the Travellers' Insurance Company of Chicago, Illinois, defendant, who is a citizen of the State of Illinois, who has been summoned, &c., of a plea of trespass on the case upon promises.

For that whereas the said defendant heretofore, to wit, on
6 the twenty-second day of September, A. D. one thousand eight hundred and sixty-five, to wit, at Chicago, Illinois, to wit, at said district, made, executed, and delivered a certain writing or policy of assurance to one Arthur H. Mosley in his lifetime, who is now dead; which said writing or policy of assurance is in the words and figures following, to wit:

"No. 658. $5,000

"*Travellers' Insurance Company of Chicago, Ill's.*

"General accidents. In consideration of twenty-five dollars, the receipt of which is hereby acknowledged, the Travellers' Insurance Company do hereby insure Arthur H. Mosley, of Chicago, Ill's, against loss of life or personal injury in the sum of five thousand dollars, to be paid to Mrs. Arthur H. Mosley, or her legal representatives, within ninety days, after sufficient proof that the assured at any time within 12 months after the date of this policy shall have sustained personal injury, caused by any accident within the meaning of this policy and the conditions hereunto annexed, and such injuries shall occasion death within three months from the happening thereof; and if the assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally dis-
7 able him from the prosecution of his usual employment, then, on satisfactory proof of such injury, compensation shall be paid to him for a period not exceeding altogether twenty-six weeks for any single accident, at the rate of twenty-five dollars per week so long as he shall be totally disabled, as aforesaid, in consequence of such injury.

"*Provided always*, That this policy is granted upon the express condition that the declarations of the assured, in his application for this insurance, which is hereby referred to and made a part of this contract, are true in all respects, and that if this policy or any renewal thereof has been or may be obtained through misrepresentation, fraud, or concealment, then this policy shall become absolutely

void, and all premiums paid in respect thereof, be forfeited to the company.

"*Provided always*, That no claim shall be made under this policy by the said assured, in respect of any injury, unless the same shall be caused by some outward and visible means, of which proof, satistory to the company, can be furnished, and this insurance shall not extend to any injury caused by or arising from natural disease, or by any surgical operation rendered necessary by disease, or to any death or injury caused by dueling or fighting, or other breach of the law on the part of the assured, or by suicide, whether felonious or otherwise, or by war, riots, or invasion, or happening while
8 the assured is in a state of intoxication, or riding races, or by his wilfully exposing himself to any unnecessary danger or peril.

"*Provided always*, That if the assured shall travel, as aforesaid, elsewhere than within the limits of the United States, the Territories thereunto belonging, or the British North American Provinces, without giving notice to the company; or if during the present civil war in this country, the said assured shall travel, as aforesaid, in any State or Territory, while such state or territory is in rebellion against the United States government, without giving notice to the company and paying such additional premium as may be required, (if the company shall agree to cover such risk,) then this policy shall become absolutely void and no claim shall be made against the company in respect thereof.

"*Provided always*, That all sums which may from time to time be paid by way of compensation to the said assured, by virtue of this policy, shall be accounted in diminution of the sum hereby insured, so that in case of subsequent injury, whether fatal or otherwise, during the continuance of this policy, the total amount to be paid by the said company shall not in any case exceed the principal sum hereby insured.

9 "This policy commences at 12 o'clock meridian, on the 22d day of September, eighteen hundred and sixty-five, and is subject to the following conditions:

"1. For the purpose of identification, one notice shall be given to the secretary of the company or the agent writing this policy, by the party assured, of all changes of residence, occupation, or name, whether by marriage or otherwise.

"2. In the event of injury within the meaning of this policy occurring to the assured, he, or in case of his death, his legal representatives, shall within ninety days, give notice in writing thereof, to the company, at their office in Chicago, Ill., or to the agent writing this policy, together with a statement of the Christian, surname, occupation, and address of the assured, with full particulars of the accident or injury.

"3. No compensation shall be payable under this policy, unless any medical adviser of the company shall be allowed to examine the person of the assured, on the occasion of any alleged injury within the meaning of this policy, when and so often as the same may rea-

sonably be required on behalf of the company, or unless such evidence as the company may from time to time require shall be furnished within the space of thirty days after demand, in writing, as to any alleged accident or injury, on the ground of which claim shall have been made against the company.

"4. Any question as to the liability of the company to pay
10 the sum insured by this policy in the case of fatal accident, or to make any compensation at all in case of personal injury, or as to the amount of compensation or otherwise, however arising hereunder, shall, if the company or the assured, or his legal representatives, require it, be referred to arbitration.

"The risk taken on any one life is limited to $10,000, and no second insurance, whether effected by one of the company's railway insurance tickets or otherwise, which, together with the sum for the time being insured by this policy, shall exceed that amount, shall hold good as to the surplus issued above $10,000.

"In witness whereof, the Travellers Insurance Company have caused these presents to be signed by their president, and attested by their secretary, at their office, in the city of Chicago, Ill.

"JOHN TYRRELL, *President.*

"Attest:

"ORVILLE PAGE, *Secretary.*"

Of which said writing or policy of assurance and provides and conditions the said defendant afterwards, to wit, on the day and year first aforesaid, at the county of Cook aforesaid, had notice; and thereupon afterwards, to wit, on the day and year last aforesaid, of the county of Cook aforesaid, in consideration that the said Arthur H. Mosley, at the special instance and request of the said de-
11 fendant, had then and there paid to the said defendant a certain sum of money, to wit, the sum of twenty-five dollars as a premium and reward for the assurance of five thousand dollars of like lawful money upon the premises mentioned in the said writing or policy of assurance, and had then and there undertaken and faithfully promised the said defendant to perform and fulfil all things in the said writing or policy of assurance contained on the part and behalf of the assured to be performed and fulfilled. The said defendant undertook, and then and there faithfully promised the said Arthur H. Mosley, that the said defendant would become and be an assurer to the said Arthur H. Mosley, of the said sum of five thousand dollars upon the premises aforesaid, and would perform and fulfil all things in the said writing or policy of assurance contained on its part and behalf as such assurer to be performed and fulfilled; and the said defendant then and there became and was an assurer to the said Arthur H. Mosley as aforesaid; and the said plaintiff in fact saith, that after the making of the said writing or policy of assurance, and between the said twenty-second day of September, A. D. 1865, and the twenty-second day of September, A. D. 1866, in the said writing or policy of assurance mentioned, to wit, on the twenty-first day of July, A. D. 1865, the said Arthur H. Mosley acci-

12 dentally fell down a pair of stairs in the city of Chicago, in said county, and was severely injured thereby, and that the said Arthur H. Mosley within three months after the happening of the said accident, to wit, on the twenty-second day of July, A. D. 1865, died and deceased out of his natural life from the effects of said accidental fall, and that the death of said Arthur H. Mosley was occasioned by said injury and accident, and that the said defendant had sufficient proof of said accident and death ninety days before the commencement of this suit.

And the said plaintiff in fact further saith, that at the time when the said writing or policy of assurance was made, executed, and delivered, she was the wife of said Arthur H. Mosley, and she is the person mentioned in the said writing or policy of assurance as "Mrs. Arthur H. Mosley, to whom the said sum of five thousand dollars was to be paid in case of the death of the said Arthur H. Mosley," in the manner mentioned in the said writing or policy of assurance.

And the said plaintiff in fact further saith, that the declarations of the said Arthur H. Mosley in his application for said insurance are true in all respects, and that said policy of assurance was not obtained through misrepresentation, fraud or concealment.

And the said plaintiff in fact further saith, that the said death of the said Arthur H. Mosley did not arise from or caused by
13 natural disease or by any surgical operation rendered necessary by disease, or by duelling or fighting, or other breach of the law, on the part of the said Arthur H. Mosley, or by suicide, felonious or otherwise, or by war, riots or invasion, or was the death of said Charles H. Mosley caused by an accident which happened while he, the said Arthur H. Mosley was in a state of intoxication, or when riding races, or by his wilfully exposing himself to any unnecessary danger or peril; but on the contrary thereof, the death of the said Arthur H. Mosley was caused by his said falling down the stairs as before stated.

And the said plaintiff in fact further saith, that the said Arthur H. Mosley did not, from the time when said writing or policy of assurance was made, executed, and delivered as aforesaid, by the said defendant to said Arthur H. Mosley, to the time of his death, travel elsewhere than within the limits of the United States, the territories thereunto belonging, or the British North American provinces; nor did the said Arthur H. Mosley, during the late civil war in this country, travel in any State or Territory while such State or Territory was in rebellion against the United States government.

And the said plaintiff in fact further saith, that the said Arthur H. Mosley gave due notice to the secretary of said defendant of all changes of residence, occupation, or name, whether by mar-
14 riage or otherwise.

And the said plaintiff in fact further saith, that within ninety days after the death of Arthur H. Mosley she gave notice in writing thereof to the said company, the said defendant, at its office in Chicago, Illinois, together with a statement of the christian, surname,

occupation, and address of the said Arthur H. Mosley, with full particulars of the accident and death of said Arthur H. Mosley.

And the said plaintiff in fact saith that the medical adviser of said defendant was allowed, and was at liberty to examine the person of said Arthur H. Mosley on the occasion of the said accident or injury, when and as often as the said defendant required so to do, and all the evidence which the defendant required as to said alleged accident and death was furnished within the space of thirty days after demand in writing; of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, had notice, and was then and there requested by the said plaintiff to pay her the said sum of five thousand dollars, and which said sum of five thousand dollars the said defendant then and there ought to have paid the said plaintiff, according to the form and effect of his promise and undertaking as aforesaid.

And whereas also the said defendant heretofore, to wit, on the eighteenth day of December, in the year of our Lord one thous-
15 and eight hundred and sixty-six, at said district, became, and was indebted to the said plaintiff in the sum of six thousand dollars of lawful money of the United States of America, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested; and whereas also the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise, of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the fur-
16 ther sum of six thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice; and whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of six thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and in the like sum for other

money by the said plaintiff before that time paid, laid out and expended for the said defendant, and at the request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon; and for the forbearance of divers other sums of money before that time, and then due and owing from said defendant to said plaintiff; and in the like sum for the price and value of work then done, and material for the same provided by the plaintiff for the defendant, and at the like special request of the defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when
17 the said defendant should be thereunto afterwards requested; and whereas also the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of six thousand dollars of the like lawful money as aforesaid, and being so found in arrear, and indebted to the said plaintiff and the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.,) was not paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damages of the said plaintiff of ten thousand dollars, and therefore the said plaintiff brings suit, etc.

HERVEY, ANTHONY & GALT,
*Plaintiffs Attorneys.*

Endorsed: Filed this 1st day of March, 1867. Wm. H. Bradley, clerk.

18 On this day to wit, the 12th day of March, A. D. 1867, came said defendant, by James L. Stark, esq., its attorney, and filed in said clerk's office its plea in said entitled cause; which said plea is in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois, of the March term, 1867.

ISABELLA MOSLEY
*vs.*
TRAVELLERS' INSURANCE COMPANY OF CHICAGO.

And the said defendant, by its attorney, Jas. L. Stark, jr., comes and defends the wrong and injury, &c., when, &c., and saith that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it; and of this said defendant puts itself upon the country, &c.

JAS. L. STARK, Jr.,
*Def'ts Att'y.*

Endorsed: Filed March 12, 1867. Wm. H. Bradley, cl'k.

On this day to wit, the 9th day of April, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in said cause, is the following entry, to wit:

19 *Assumpsit.*

ISABELLA MOSLEY
*vs.*
TRAVELLERS' INSURANCE COMPANY OF CHICAGO, ILLINOIS.

Now come the parties, by their attorneys, and upon issue joined, thereupon come a jury of good and lawful men, to wit: William S. Brown, Luther Burley, William Dickson, Horace C. Gellett. J. W. Connett, W. E. Johnson, J. B. Martin, J. O. True, W. P. Hewett, F. Gunnell, L. M. Ballou, and W. Parks, who were all duly elected, tried, and sworn well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the tenth day of April, in the adjourned Macrh term, A. D. 1867, of said court, in the record of the proceedings thereof is the following entry, to wit:

*Assumpsit.*

ISABELLA MOSLEY
*vs.*
TRAVELLERS INSURANCE COMPANY OF CHICAGO, ILLINOIS.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, and by consent of the parties by their attorneys, J. W. Connett, one of the jurors

20 in this cause, is excused, with an agreement on the part of the counsel that the trial shall proceed with the eleven jurors, their verdict to have the same effect as though rendered by a full pannel; and after hearing additional evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until tomorrow morning.

On this day to wit, the eleventh day of April, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

*Assumpsit.*

ISABELLA MOSLEY
*vs.*
TRAVELLERS INSURANCE COMPANY OF CHICAGO, Illinois.

Now comes again the parties by their attorneys, and now come also the eleven jurors in this behalf empannelled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the twelfth day of April, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry to wit:

21 *Assumpsit.*

ISABELLA MOSLEY
*vs.*
TRAVELLERS' INSURANCE COMPANY, of Chicago, Illinois.

Now come again the parties, by their attorneys, and now come also the eleven jurors in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retires to consider of their verdict; and after a short absence the jury returned into court the following verdict, to wit:

We, the jury, find the issue for the plaintiff, and assess her damages to the sum of five thousand and one hundred dollars.

And thereupon the defendant, by its attorney, moves the court for a new trial herein.

On the trial of said cause the following exceptions were taken, and were allowed by the court, and made of record in said entitled cause, and are in the words and figures following, to wit:

March T., 1867.

ISABELLA MOSLEY
*vs.*
THE TRAVELLERS' INSURANCE CO.

On the trial of this case the plaintiff offered in evidence the following policy of insurance, which is in the words and
22 figures following, to wit:

No. 658. $5,000.

*Travellers' Insurance Company of Chicago, Ill's.*

General accidents.—In consideration of twenty-five dollars, the receipt of which is hereby acknowledged, the Travellers' Insurance Company do hereby insure Arthur H. Mosley, of Chicago against loss of life or personal injury in the sum of five thousand dollars, to be paid to Mrs. A. H. Mosley, or her legal representatives, within ninety days after sufficient proof that the assured, at any time within twelve months after the date of this policy, shall have sustained personal injury, caused by any accident within the meaning of this policy, and the conditions hereunto annexed, and such injuries shall occasion death within three months from the happening thereof; and if the assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment, then, on satisfactory proof of such injury, compensation shall be paid to him for a period not exceeding, altogether, twenty-six weeks for any single accident, at the rate of twenty-five dollars per week, so long as he shall be totally disabled, as aforesaid, in consequence of such injury.

*Provided always*, That this policy is granted upon the express condition that the declarations of the assured in his application for this insurance, which is hereby referred to and made a part of this contract, are true in all respects; and that if this policy, or any renewal thereof, has been, or may be, obtained through misre-
23 presentation, fraud, or concealment, then this policy shall become absolutely void, and all premiums paid in respect thereof be forfeited to the company.

*Provided always*, That no claim shall be made under this policy by the said assured in respect of any injury, unless the same shall be caused by some outward and visible means, of which proof satisfactory to the company can be furnished; and this insurance shall not extend to any injury caused by or arising from natural disease, or by any surgical operation rendered necessary by disease, or to any death or injury caused by dueling or fighting, or other breach of the law on the part of the assured, or by suicide, war, riot, or invasion.

*Provided always*, That if the assured shall travel, as aforesaid, elsewhere than within the limits of the United States, the Territories thereunto belonging, or the British North American provinces, without giving notice to the company, and paying such additional premium as may be required, then this policy shall become absolutely void and no claim shall be made against the company in respect thereof.

*Provided always*, That all sums which may from time to time be paid by way of compensation to the said assured, by virtue of this policy, shall be accounted in diminution of the sum hereby insured, so that in case of subsequent injury, whether fatal or otherwise, during the continuance of this policy, the total amount to be paid by the said company shall not in any case exceed the principal sum hereby insured.

24 This policy commences at 12 o'clock, meridian, on the 22d day of September, eighteen hundred and sixty-five, and is subject to the following conditions:

1. For the purpose of identification, due notice shall be given to the secretary of the company, or the agent writing this policy, by the party assured, of all changes of residence, occupation, or name, whether by marriage or otherwise.

2. In event of injury within the meaning of this policy occurring to the assured, he, or in case of his death, his legal representatives, shall, within thirty days thereafter, give notice in writing thereof to the company, at their office in Chicago, Ill., or to the agent writing this policy, together with a statement of the christian, surname, occupation, and address of the assured, with full particulars of the accident or injury.

3. No compensation shall be payable under this policy unless any medical adviser of the company shall be allowed to examine the person of the assured on the occasion of any alleged injury within the meaning of this policy when and so often as the same may reasonably be required on behalf of the company; or unless such evidence as the company may from time to time require shall be furnished within the space of thirty days after demand, in writing, as to any alleged accident or injury on the ground of which a claim shall have been made against the company.

25 4. Any question as to the liability of the company to pay the sum insured by this policy in case of fatal accident, or to make any compensation at all in case of personal injury, or as to the amount of compensation, or otherwise however arising hereinunder, shall, if the company or the assured, or his legal representatives, require it, be referred to arbitration.

5. The risk taken on any one life is limited to $10,000, and no second insurance, whether effected by one of the company's railway insurance tickets or otherwise, which, together with the sum for the time being insured by this policy shall exceed that amount, shall hold good as to the surplus insured above, $10,000.

In witness whereof, the Travellers' Insurance Company have caused these presents to be signed by their president and attested by their secretary, at their office in the city of Chicago Ill.

(Signed) JOHN TYRRELL, *President*.

Attest.

(Signed) ORVILLE PAGE, *Secretary*.

Endorsed: Amount, $5,000. Date, September 22d, 1865. Expires, September 22d, 1866. Term of twelve months. Premium, $25 00. Policy, $0 50=25 50. A. T. Barnes, ag't.

26 There was much additional testimony introduced on both sides having a bearing on the main point in controversy between the parties, namely, the cause of the death of Mr. Mosley; the plaintiff contending that it was the consequence of a fall that he met with in going into his back yard on the night between the 18th and 19th of July, 1866, and the defendant that it was not. It appeared that Mr. Mosley was in his usual health until that night. He and Mrs. Mosley had gone to bed, when, between 12 and one o'clock he got up and went down stairs, and when he came up he complained to his wife and son of having had a fall, and the symptoms were described by him at the time. He continued ill until Monday, the 22d, when he died. There was testimony, medical and otherwise, given of his mental and bodily condition from the time of the alleged accident up to the time of his death; there was also medical testimony given of his condition after death, and of an examination of the head (cranium and brain, externally and internally.) The plaintiff insisted that the evidence she introduced tended to show that Mr. Mosley died in consequence of the fall before referred to, and the defendant insisted that the evidence introduced by the company tended to show that death was not caused by any fall but was in consequence of disease, (congestion of the brain.) The court instructed the jury generally on the law of the case, and left it to the jury to say as to question of fact, whether the death of Mr. Mosley was caused by an acci-

27 dent within the meaning of the policy. There was also evidence introduced on the trial not here referred to, and which it not necessary to mention.

During the trial, Mrs. Mosley, the plaintiff, was introduced as a witness, (the person to whom the policy was made available,) and she testified on the part of the plaintiff that on Wednesday night, the 18th of July, 1866, she and her husband had gone to bed. Between twelve and one o'clock he got up and went down stairs for the purpose of going out back; she didn't know how long he was gone. When he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling down the stairs which led out back. She noticed that his voice trembled, and she inquired into the matter at once. He complained of his head, and appeared faint and vomited; he threw up almost as soon as he got into the room; she got up, and he laid down on the sofa. He had nothing on but his pants and vest; she didn't sleep any more that night, and was up with him all night. He complained and appeared to be in great pain. She asked him if she should send for Dr. Webster, who lived near, but he said no; he thought he should be better, and she did not then call the doctor. On Thursday morning he said he felt bad, and there was a recurrence of fainting.

To all that portion of the testimony of Mrs. Mosley which

28 set forth the declarations of her husband about his falling down the back stairs and almost killing himself and hurting the back part of his head the defendant's counsel then and there objected, which objection was overruled by the court; to which opinion of the court the defendant then and there excepted.

William H. Mosley, (the son of the deceased, but not the son of the plaintiff,) testified on the part of the plaintiff that on the night of the 18th of July he slept in the lower part of the building where his father was that night, (197 South Clark st., Chicago,) and the witness went to bed about 10 o'clock. He saw his father about 12 o'clock "lying on the counter with his head," and he asked him what was the matter, and he answered that he had fallen down the back stairs and hurt himself very bad. To this question and answer the defendant, by his counsel, objected, and the court overruled the objection; to which decision of the court the defendant then and there excepted.

The witness, after giving further testimony, had his attention directed to what took place Thursday evening, and he said he saw his father about seven o'clock lying on the sofa.

Question. Did you make any inquiry of him how he felt?

Answer. He said he felt very bad.

To this last question and answer the defendant then and there objected, and the court overruled the objection; to which decision of the court the defendant then and there excepted.

29 The witness was further interrogated:

Question. Did he complain of any particular feeling of injury or pain in any part of his body?

Answer. He said when he tried to get up and walk across the room his head would be dizzy.

To this last question and answer the defendant then and there objected, and the court overruled the objection; to which said decision of the court the defendant then and there excepted.

The witness was further interrogated as to what was the condition of his father Friday evening when he saw him lying on the sofa, and what his father said to him. "He said he was a little worse if anything." To this last answer the defendant objected, and the court overruled the objection; to which decision of the court the defendant then and there excepted.

There was no witness who testified that he saw Mr. Mosley fall down the steps; though there were several who testified as to the fact of back stairs being there, leading to the back yard.

[SEAL.] THOMAS DRUMMOND.

Endorsed: Filed April 12th, 1867. Wm. H. Bradley, cl'k.

On this day, to wit, the 13th day of April, A. D. 1867, came the defendant, by its attorney, and filed in said clerk's office its motion for a new trial in said-entitled cause, which said motion is in

30 the words and figures following, to wit:

Circuit Court.—March term, A. D. 1867.

*Assumpsit.*

ISABELLA MOSELEY,
*vs.*
TRAVELLERS' INSURANCE COMPANY.

UNITED STATES OF AMERICA, *Northern District of Illinois*:

And now comes the said defendant, by its attorney, James L. Stark, jr., and moves the said court for a new trial in said cause for the following reasons, to wit:

I. The verdict is against the evidence.

II. For admitting incompetent and improper testimony.

III. The verdict should have been against the plaintiff, and in favor of the defendant.

IV. For giving improper instructions to the jury.

JAMES L. STARK, JR.,
*Defendant's Attorney.*

Endorsed: Filed April 13th, '67. Wm. H. Bradley, cl'k.

31 On this day, to wit, the 20th day of April, A. D., 1867, came the defendant, by its attorney, and filed in said clerk's office its motion for arrest of judgment in said entitled cause which said motion is in the words and figures following, to wit:

Circuit Court.—March term, A. D. 1867.

*Assumpsit.*

ISABELLA MOSELEY,
*vs.*
TRAVELLERS' INSURANCE COMPANY.

UNITED STATES OF AMERICA, *Northern District of Illinois*:

And now comes the said defendant, by its attorney, James L. Stark, jr., and moves this court to arrest the judgment in this cause for the reason the matters of fact in said declaration stated, and the evidence introduced in support of the same, does not warrant the entry of judgment; wherefore said defendant moves that the same be arrested.

JAMES L. STARK, Jr.,
*Defendant's Attorney.*

Endorsed: Filed April 20, 1867. Wm. H. Bradley, cl'k.

32 On this day, to wit, the twentieth day of April, in the adjourned March term, A. D. 1867, of said court in the record of the proceedings thereof is the following entry, to wit:

*Assumpsit.*

ISABELLA MOSELEY
*vs.*
TRAVELLERS' INSURANCE COMPANY, of Chicago, Illinois.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein by the attorney for a new trial of this cause; and after hearing the arguments of counsel, the court overrules said motion, and thereupon the defendant by its attorney moves the court in arrest of judgment, which is overruled by the court.

It is thereupon considered and adjudged by the court that the said plaintiff do have and recover of said defendant the said sum of five thousand and one hundred dollars her damages, so as aforesaid assessed, together with her costs and charges by her about her suit in this behalf expended, amounting to the sum of seventy-nine dollars and twenty-five cents, and that she have execution therefor.

33 On this day, to wit, the 1st day of May, A. D. 1867, came the defendant, by its attorney, and filed in said clerk's office its appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Circuit Court of the United States for the eighth circuit and northern district of Illinois.

ISABELLA MOSELEY
*vs.*
TRAVELLERS' INSURANCE COMPANY.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

Know all men by these presents that the Travellers' Insurance Company, as principal, and William F. Tucker of the city of Chicago, Charles L. Currier of Freeport, and Allen Gibson, of the city of Rockford, and State of Illinois, are held and firmly bound unto the above-named Isabella Moseley, in the sum of seventy-five hundred dollars, lawful money of the United States of America, to be paid to said Isabella Moseley, her heirs, executors, and assigns, to which payment well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators firmly by these presents.

34 Sealed with our respective seals and da. this 20th day of April, 1867.

Whereas the above-named Travellers' Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to recover the judgment rendered in the above-entitled cause by the Circuit Court of the United States for the eighth circuit and northern district of Illinois, dated on the 20th day of April, A. D. 1867, for the sum five thousand one hundred dollars, and costs:

Now, therefore, the condition of this obligation is such, that if the said Travellers' Insurance Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] WM. F. TUCKER.
[SEAL.] CHAS. L. CURRIER.
[SEAL.] ALLEN GIBSON.

Signed, sealed, and delivered in presence of—
{ SEAL OF TRAVELERS' INS. CO. } TRAVELLERS' INS. CO.
{ } Per JNO. W. CLAPP, *Sec.*

Approved:

THOMAS DRUMMOMD.

Endorsed: Filed May 1st, 1867. Wm. H. Bradley, cl'k.

35
36 CIRCUIT COURT OF THE UNITED STATES,
*Northern District of Illinois, ss:*

The United States of America to the judges of the Circuit Court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Isabella Mosley, plaintiff. and the Travellers' Insurance Company, of Chicago, Illinois, defendant, a manifest error hath happened to the great damage of the said The Travelers' Insurance Company of Chicago, Illinois, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
37 same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

WM. H. BRADLEY, *Clerk.*

38 NORTHERN DISTRICT OF ILLINOIS, *ss:*

William H. Bradley, clerk of the Circuit Court of the United States for said northern district of Illinois, do hereby certify the

foregoing transcript to be a true and correct copy from the record of all the proceedings, which have been had in said court in said cause of Isabella Mosley against the Travellers' Insurance Company of Chicago, as the original of the same now remains in my custody, and that the writ of error sued out on the judgment therein entered by the said Travellers' Insurance Company, the plaintiff in error, is also appended to said transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said northern district, this 29th day of November, A. D. 1867.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[5-ct stamp.]

39 UNITED STATES OF AMERICA, *ss*:

To Isabella Mosely, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, for the seventh circuit and northern district of Illinois, wherein the Travelers' Insurance Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, one of the justices of the said Circuit Court of the United States, this 29th day of November, in the year of our Lord, 1867.

THOMAS DRUMMOND.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss*:

Seth M. Dunning, being first duly sworn, on oath deposes and says that he served a copy of the within citation on Isabella Mosley, the defendant in error, by delivering a copy of the same to her this thirtieth day of November, in the year of our Lord, 1867.

SETH M. DUNNING.

Subscribed and sworn to before me this thirtieth day of November, A. D. 1867.

WM. H. BRADLEY, *Clk.*

Endorsed: U. S. Supreme Court. Travellers' Insurance Co., pl'ff in error, *vs.* Isabella Mosley, def't in error. Citation.

# SUPREME COURT OF THE UNITED STATES.

*DECEMBER TERM, A. D. 1868.*

***The Travellers' Insurance Company,***
OF CHICAGO.
*Plaintiff in Error,*
vs.
***Isabella Mosley,***
*Defendant in Error.*

## BRIEF, POINTS AND ARGUMENT

FOR PLAINTIFFS IN ERROR.

BY O. B. SANSUM.

# SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1868.

***The Travellers' Insurance Company,***
OF CHICAGO,
*Plaintiff in Error,*
vs.
***Isabella Mosley,***
*Defendant in Error.*

## BRIEF, POINTS AND ARGUMENT

FOR PLAINTIFFS IN ERROR.

The defendant in error brought her action in the Court below to recover of the plaintiff in error the sum of five thousand dollars upon a contract of insurance. It was tried by a jury who rendered a verdict for the plaintiff below for the amount mentioned in the contract, $5,000—*plus* $100 interest. In all $5,100.

The case comes up upon a plea of the general issue.

The record shows, *first*, that plaintiff in error on the 22d day of September, 1866, made with Arthur H. Mosley the contract offered in evidence at the trial below; and that by it the plaintiff in error undertook and promised to insure the said Arthur H. Mosley against loss of life or personal injury in the sum of five thousand dollars, to be paid to Mrs. Arthur H. Mosley within ninety days after sufficient proof that the assured, at any time within twelve months after the date of the contract, should have sustained personal injury caused by any accident within the meaning of the contract, and the conditions thereto annexed, provided such injury should occasion death within three months from the

happening thereof; and in case the insured should sustain personal injury which should not be fatal, but which should absolutely and totally prevent his prosecuting his usual employment, then, on satisfactory proof, compensation should be made for a period not exceeding twenty-six weeks for any single accident, at the rate of twenty-five dollars per week. *Provided, however*, that no claim should be made in respect of any injury unless it should be caused by some outward and visible means, of which proof satisfactory to the Company can be made.

And, *second*, that the deceased died on the 21st day of July, 1866.

And, *third*, that at the trial below the defendant in error testified that on the night of the 18th July, 1866, defendant in error and the deceased (insured) went to bed, and that between twelve and one o'clock deceased went down stairs; but as to how long he was absent she did not know; and that *after* he returned he told her that he had fallen down the back stairs, and hit the back of his head, and nearly killed himself; that he complained of his head, and appeared faint and vomited; she asked if she should send for a doctor, and he replied no. She did not call a doctor "because he said he thought he would be better." And that to all that portion of the testimony of Mrs. Mosley, which set forth the declarations of the deceased about his falling down the back stairs, the plaintiff in error objected, and the Court overruled the objection, and the plaintiff in error excepted to the ruling of the Court. And that William H. Mosley, son of deceased, (but not the son of defendant in error,) testified that he saw his father lying on the counter with his head, and he asked him what was the matter, and he answered that he had fallen down the back stairs and hurt himself very bad, and that to this testimony the plaintiff in error objected, and the Court overruled the objection, and that the plaintiff in error excepted to the ruling of the Court.

And *fourth*, that there was no witness who testified at the trial that he saw deceased fall down the stairs.

## POINTS.

### I.

The undertaking is to pay to the defendant in error $5,000 within ninety days after the death of Arthur H. Mosley, provided it occurred by accidental injury and within three months after the injury; and provided, too, the injury should be by outward and visible means, of which "*proof satisfactory*" *to the plaintiff in error* "*can be furnished.*"

### II.

The contract is not to pay the sum mentioned within ninety days after proof of death, but it is to pay the sum mentioned within ninety days after it is proved to the Company's satisfaction that the death of the insured was caused by injuries the result of accident.

### III.

Defendant in error must show, 1st, that deceased died from injuries caused by accident, and, 2d, that proof thereof was satisfactory to plaintiff in error.

### IV.

Declarations made by deceased to the defendant in error and to his son are not proper evidence to establish the fact that deceased did fall down the stairs in question. (Mima Queen & Child *vs.* Hepburn, 7 Cranch, 290. King *vs.* The Inhabitants of Eriswell, 3 T. R. 707. Ellicot *vs.* Pearl, 10 Pet., 412.)

### V.

If the declarations made by deceased to defendant in error and to his son are not admissible evidence to establish the fall down the stairs, then there is nothing to establish an accident; for the bill of exception states that no witness testified that deceased did fall down the stairs.

## ARGUMENT.

It is submitted that the first and second points are established by the terms and conditions of the contract. For it is not an insurance against death generally; but it is an agreement to pay to the defendant in error a sum certain, provided Arthur H. Mosley died from injuries—not injuries generally, but *accidental* injuries.

In the second condition of the contract it is expressly provided that proof *satisfactory* to the plaintiff in error shall be made. The plaintiff in error is the judge as to what proof shall be satisfactory. It may be a hard agreement, but it is still the contract between the parties. The Court will enforce the contract that the parties have made. The plaintiff in error, by refusing to pay the sum insured, and by contesting the demand, says that the proof of the injuries and accident are not satisfactory. There is no allegation in the declaration that proof of the injuries and accident has been *satisfactory to plaintiff in error.* The Court will presume that to have been proven which is properly alleged, but no presumption will be made as to things material which are not properly alleged; and if the allegations in the declaration are such as to show that a general demurrer would have been sustained had it been made, there should have been an arrest of judgment.

Upon the third point, it is submitted, that as the bill of exceptions distinctly states that no witness was called to prove that the deceased fell down the stairs, it cannot be presumed that evidence was given to prove an accident. And supposing that the Court shall go so far as to hold that the declarations of the deceased are admissible to establish the fact that he did fall, still there is nothing in them to show that it was an accidental fall. It is as proper to presume that the fall resulted from carelessness or negligence as to presume it was accidental. If the proof were evenly balanced, the defendant in error could have no judgment, for it ought to preponderate for her; and if the presumptions are even she ought not to have judgment. Her evidence must preponderate, and it is so with the presumptions for her.

Upon the fourth and fifth points it is submitted that the declarations of deceased made to his wife and son *four days* before he died, ought not to have been admitted to establish the fact that deceased did fall down the stairs in question, because they are

clearly hearsay, and they come not within any of the exceptions to the general rule that derivative or second-hand statements are not receivable as evidence *in causa*. (Best's Evidence, § 493.) The reasons against admitting them are that the party against whom the evidence is offered has had no opportunity to cross examine the original source; and, that assuming the original statement to be correctly reported, it was not originally made under the sanction of an oath; and, though it were made under the sanction of an oath *in judicio*, it is not admissible unless the party against whom it is offered had the right and opportunity to cross examine, but neglected it.

The same learned author strongly and forcibly illustrates, for he says: "Thus what A (a witness) has heard B (a stranger) say, is not only not admissible in the first instance, but the clearest proof of the death, complete and incurable lunacy, &c., of B, would not render it admissible; and the reason is that the tendered evidence consists of the statement of a person who cannot be subjected to cross examination. The primary source is not exhausted, and derivative evidence is rightly rejected."

The law resorts to certain tests of truth, the effect of which is to exclude all evidence not warranted by those tests, or guards against deceit. Therefore it is that all evidence shall be of the purest and most satisfactory kind which the circumstances admit. (Starkie Ev.,* 20.)

The circumstances of this case are therefore to be consulted to ascertain whether, according to the law of evidence, the tendered and admitted evidence comes within any of the exceptions to the general rule which excludes declarations of persons not examined *in judicio*.

*Ex necessitate* is one exception. But the death or lunacy of a witness who had immediate knowledge of the fact is not considered sufficient to relax the general rule. The exception *ex necessitate* must have arisen from a general presumption coming out of the nature of the case, and that in the common course of human affairs, there would be a defect of evidence and a failure of justice unless such evidence was admitted. (Starkie,* 28.) Marshall C. J., in Mima, Queen & Child *vs.* Hepburn, 7 Cranch. 290, said: "If the circumstance that the eye witness of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim

to which might be supported by proof as easily obtained. This Court is not inclined to extend the exceptions further than they have already been carried." And again in the 1st Wheaton, p. 6, the same learned Judge said: "We have revised our decision in the case of Mima Queen *vs.* Hepburn, and confirmed it."

The fact which defendant in error seeks to establish by these declarations, is not one of reputation nor of pedigree or boundary; therefore none of these exceptions apply.

Examine them under the light of dying declarations.

A declaration made *in extremis*,—under the apprehension of approaching dissolution, is admissible in certain cases, but they are criminal cases only. This is a civil action. They are never admitted unless the Court is satisfied that the party who made the declaration was under the impression of approaching death, and unless they *relate to the cause of his death*, and are tendered on a criminal charge respecting it. (Starkie Ev., *38.) But such is not the case at bar.

There is but one other light under which these declarations can be examined, and their admissibility tested—that is *res gestæ*. Are they *res gestæ?* Starkie says *res gestæ* are the surrounding facts of a transaction, and may be submitted to a jury provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute. And again it is said declarations accompanying an act, explanatory of that act, are *res gestæ*. They are the surrounding facts,—explanatory of an act, or showing a motive for acting. But the principal fact must be first established, and until it is established surrounding facts are not admissible—and certainly exhibiting surrounding facts is not establishing a principal fact. For example: A merchant leaves his place of residence or denies himself to his creditors. That he left his place of residence or denied himself to his creditors upon an issue of bankruptcy, are material facts; and one of these being proven, his declarations made to others explaining why he left or denied are admissible as *res gestæ*; but it would not be competent to show what he said unless it were first made to appear that he has denied, or left his place of residence.

The learned counsel for the defendant in error cites Iveson *vs.* Kinnard, 6 East., p. 180, and relies upon it alone as decisive in

this case. It is his only authority, and it is submitted that it makes against and not for his case. In that case the issue was whether the insured was in good health at the time the policy then in question was effected on her life by her husband. A few days after the physician examined her, and made inquiries of her about her health, she was seen in bed at 11 o'clock in the forenoon; and a witness was called to testify to the fact that she saw the deceased in bed at the time mentioned, and that deceased then said she was not in good health, and that she was afraid she would die before the policy could be delivered. The fact that deceased was in bed was established by the witness. This was a material fact to be established upon the issue made in the case, viz.: whether the deceased was in good health at the time; and doubtless the declarations of the deceased were admissible, explaining why she was in bed. Upon an issue as to whether the deceased was well or ill at the time in question, her declarations were admissible; for one's feelings while suffering from any malady are the true indicators of that malady, and how the deceased in the case cited felt could only be ascertained by what she said. The case upon which my learned brother relies so confidently is one of necessity as well as *res gestæ*. The very nature of that case made it necessary to show what the deceased said as to how she felt; and being found sick in bed, her declarations why she was there is a surrounding fact, explanatory of the material fact—being found in bed.

The declarations of the deceased in the case at bar, as they show how he felt in the presence of the witnesses, are *res gestæ*, so far they are explanatory of the other facts that were occurring then. But it is submitted that as evidence of his *fall down the stairs they are not competent.*

Upon this question the learned counsel refers to Greenleaf on Ev., Vol. 1, § 102. The law is there laid down in the following words: "Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are admissible, made at the time in question, are also original evidence." But the declarations of deceased upon the case at bar are not offered to show what his bodily and mental feelings were at the time in question. They are offered to establish an accidental fall. If they were offered to show his bodily feelings at the time he made them, that would be a different case.

Declarations or communications are original evidence when the *fact* that such communication was made, and not its truth or falsity is the point in controversy. (Greenleaf Ev., Vol. 1, § 101.

The fact that deceased *declared* to the defendant in error that he had fallen down the back stairs and hit his head, is not the point *in controversy* in the case at bar. The controversy between the parties is, did the deceased fall down the stairs in question, and was the fall accidental? The *declaration* of the deceased, made to the defendant in error, as she says, several days before he died, is all that we have upon the facts in question. Is that competent and enough? That is not competent to prove the fall; how is it enough to prove the accident?

The vice in my learned brother's case is plain enough to be seen if he will look at it. It is simply this: His case demanded proof that the death of deceased was occasioned by an accidental fall down certain stairs; and he calls a person who had no knowledge of the fall to tell to the jury that deceased declared he fell down the stairs.

Suppose that the defendant below had sought to establish the fact that immediately before the fall deceased said he would commit suicide, and that he then wilfully cast himself down the stairs, and to establish this fact defendant below called a witness to prove that another now dead or lunatic declared that he heard the insured make these declarations. Clearly such evidence would not be proper, and it would be useless for the plaintiff in error to show the death of the person who heard the declarations and saw the wilful act of the insured. The law of evidence would in such a case reply: If your witness is dead it is your misfortune, but the rule shall not be relaxed. It may obstruct truth in the case presented, but it excludes much error in many cases.

S. H. Fuller

O. B. Sansum

O. B. SANSUM,

*Attorney for Plaintiff in Error.*

*Robert Fergus' Sons, Printers, 12 & 14 Clark St., Chicago.*

# In the Supreme Court

OF THE

# UNITED STATES.

## ERROR to the CIRCUIT COURT of the UNITED STATES for the Northern District of Illinois.

***Isabella Mosley,***
*Defendant in Error,*
*ads.*
***The Travellers' Insurance Company of Chicago,***
*Plaintiffs in Error.*

## Points and Argument for Def't in Error.

This was an action of assumpsit, brought by the Defendant in Error against the Plaintiffs in Error, in the Circuit Court of the United States for the Northern District of Illinois. The action was brought on a Policy of Insurance against Accidents, issued by the Plaintiffs in Error, whereby they agreed to pay to the Defendant in Error $5000, in case Arthur H. Mosley, the husband of the Defendant in Error, should meet with an accident which should result in death within the period limited by the Policy.

There was a verdict rendered for the Plaintiff below for $5100, the full amount of the Policy and interest from the time when the amount became due, according to the terms of the Policy, on which judgment was subsequently entered in the Court below.

To reverse this judgment, the Plaintiffs in Error bring the cause to this Court.

There was no controversy on the trial, that the Policy was duly issued, the premium paid, and that the assured was dead within the term limited by the Policy.

It was, however, urged that his death was not the result of an accident, but had been caused by disease, and on that point considerable testimony was given, all of which was submitted to the Jury on proper instructions, and the Jury found that an accident had caused the death of the assured. It was established that Arthur H. Mosley had fallen down stairs leading to the yard in the rear of his premises, at night, when about going out to the yard, and had received a concussion of the brain, from which injury death resulted within a few days.

If this fact were established on the trial by legal evidence, then the Plaintiff below was entitled to recover, and the judgment rendered by the Court below was right, and ought to be affirmed.

There is but a single point relied on to reverse the judgment, that is the admission by the Court below of the declarations of the deceased as to his sufferings during his illness, and his declaration made at the time of the accident, and as soon as he returned to his bedroom, as to the nature of the injury which he had sustained.

The questions relating to this part of the evidence, and the replies thereto, being correctly set out in the transcript of the Record.

The Plaintiff below and her husband, the deceased, had gone to bed, as usual, on the night of the 18th July, 1866.

Between 12 and 1 o'clock of that night, the deceased got up and went down stairs, for the purpose of going out into the yard.

When he returned, he complained of having hurt the back of his head from *having fallen down the stairs leading to the yard.* He complained of great pain, and said he had almost killed himself. He complained of violent pain in his head. The Plaintiff below, on her husband's return, heard him groan, and observed that his voice trembled, and hence her enquiries. In reply to her, the deceased stated that he had fallen down stairs and hurt himself; and she saw also that he was faint, and vomited. He vomited almost as soon as he returned to the bedroom. She got up, and de-

ceased then lay down on the sofa. He complained a good deal of his injuries, and Mrs. Mosley got up and *sat* up with her husband all night. He appeared to be in great pain all night. She proposed to send for a physician, but, at her husband's request, did not then do so.

On the following morning, the deceased still complained of great pain, and there was a recurrence of the fainting fits.

The son of the deceased, who slept in the store part of the building, was also examined as a witness, and he testified that on the night in question he went to bed about 10 o'clock.

About midnight he was awakened by seeing his father, the deceased, lying with his head on the counter. Witness asked him what was the matter, and the deceased replied he had hurt his head very badly *by falling down the back stairs.*

On the following evening, he again saw his father, lying on the sofa, and asked him how he felt, and the deceased said "he felt very badly," and "that when he got up and tried to walk across the room he would get dizzy."

On Friday evening, he again saw his father, lying on the sofa, and enquired "how he felt," the reply was, "worse, if anything."

It may be here remarked, that this young man, although he lived at home, was employed at another place, and was only at home mornings and evenings.

The Defendants below objected to the evidence above noticed, but the Court admitted the same; and this ruling of the Court, in admitting such evidence, is the single point on which it is sought to reverse this judgment.

## I.

That the evidence in question was proper evidence, is well settled; and, as Greenleaf, in his work on Evidence, vol. i, sec. 102, p. 132, says, that "the representation by a *sick person* of the nature, symptoms, and effects